

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES AVERY AUSTIN,

Defendant-Appellant.

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UNPUBLISHED

October 22, 2002

No. 234432

Oakland Circuit Court

LC No. 00-175432-FC

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to fourteen years and four months to fifty years' imprisonment for each of the two convictions. He appeals as of right. We affirm.

Defendant contends that the trial court's jury instructions regarding prior inconsistent statements were both erroneous and inconsistent. However, we note that defendant's trial counsel expressed satisfaction with the jury instructions after they were read. Accordingly, the error, if any, has been "extinguished," and appellate review of this issue has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Next, defendant contends that the trial court erred in scoring offense variable 10 (OV-10) at fifteen points. We review the trial court's scoring of an offense variable only to determine if it was supported by the evidence. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

MCL 777.40(1)(a) provides that OV-10 should be scored at fifteen points if "predatory conduct was involved." MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at the victim for the primary purpose of victimization." For example, we have affirmed a trial court's finding of predatory conduct where the evidence indicated that the defendant drove around looking for a victim for about an hour and followed the victim home for the purpose of committing a crime. *People v Kimble*, \_\_\_ Mich App\_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 227212, issued July 19, 2002), slip op p 3.

Here, the evidence suggested that defendant promoted a friendship between the two alleged victims, which provided defendant an opportunity to drive each victim to the other

victim's house. Moreover, the evidence suggested that defendant would drive one of the victims to rent movies. It is certainly plausible that defendant engaged in this conduct to provide an opportunity to engage in the prohibited conduct, but also to foster a relationship with the victim. In addition, defendant's decision to live with that victim's family is suggestive of predatory conduct. Rather than living alone in his camper, defendant paid the victim's family \$100 a week to live in their crowded mobile home. It is certainly plausible that defendant sought out this living opportunity to get closer to this victim. In light of these facts, we believe that there was evidence that defendant engaged in pre-offense conduct directed, at the very least, toward one of the victims. Accordingly, we conclude that there was evidence supporting the trial court's scoring of OV-10 at fifteen points.

Finally, defendant contends that, during sentencing, the trial court improperly commented that defendant was guilty of first-degree criminal sexual conduct. Defendant argues that the trial court sentenced defendant based on his personal beliefs, rather than the jury's verdict. Thus, defendant challenges his sentence at the maximum of the appropriate sentencing guidelines range. However, MCL 769.34(10) provides in pertinent part: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Here, even though the trial court imposed the maximum possible sentence, defendant's sentence was nevertheless within the appropriate sentencing guidelines range. Accordingly, we must affirm defendant's sentence. MCL 769.34(10).

Affirmed.

/s/ Henry William Saad  
/s/ Michael R. Smolenski  
/s/ Donald S. Owens